Nebraska Law Review

Volume 90 | Issue 3 Article 7

2012

# Thinking Outside the Disability Management Box: The Case for Modified Duty Off-Site in Nebraska

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Comment*

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## I. INTRODUCTION

Employers and employees alike benefit when injured employees quickly return to work following a work-related injury.[1] Often, this requires employers to modify current work assignments or to create alternate assignments that accommodate an employee's medical restrictions while the employee heals. The alternative assignments—or "light-duty" work—can take many forms. For example, clerical duties, secretarial responsibilities, and other alternative positions can be implemented into the company's return-to-work policy. Unfortunately, however, not all employers can accommodate injured employees. In such situations, an injured employee may sit idly at home while the employer pays his or her workers' compensation benefits. Consider the following:

(a) A city firefighter of thirty-five years injures his back while on duty. While he recovers, the fire department refuses his request to return to work in a light-duty position because none were available.[2]

(b) A repairman for the local water company is injured while attempting to repair a jockey pump. Due to medical restrictions preventing him from performing certain necessary functions, such as crawling, operating heavy equipment, squatting, and working at heights, the company informs him that it cannot accommodate his request to return to work in a light-duty position.[3]

(c) A Campbell Soup Company worker slips and falls on a wet concrete floor at work, injuring his back. The worker's physician excuses him to work in a light-duty capacity but Campbell Soup has no light-duty work available. The company pays him temporary, total disability benefits while he sits idly at home and recovers.[4]

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1. *See infra* section II.A.
2. *See* Milwaukee v. Labor & Indus. Review Comm'n, No. 82-1870, 1983 WL 1614498, at *1 (Wis. Ct. App. June 13, 1983).
3. *See* Irving v. Chester Water Auth., No. 08-5156, 2010 WL 2512370, at *1–2 (E.D. Pa. June 17, 2010).
4. *See* Thompson v. Campbell Soup Co., No. CA90-416, 1991 WL 89668, at *1 (Ark. Ct. App. May 22, 1991).

A number of industries[5] are prevented from enjoying the myriad benefits associated with Early-Return-to-Work (ERTW) programs. To help these industries realize those benefits, an innovative, new disability management tool has gained interest throughout the country—a Modified Duty Off-Site (MDOS) program.[6] Through MDOS programs, an employer can direct injured employees to a local charity or nonprofit organization for light-duty work while the employees recover.[7]

Although a handful of businesses in Nebraska have implemented the program,[8] Nebraska law is silent as to whether its Workers' Compensation Act permits MDOS programs. Neither Nebraska's revised statutes nor the Nebraska courts confirm the permissibility of MDOS programs.[9] Moreover, the compensation court's historically liberal protection of employees[10] could result in the court finding MDOS programs are more harmful to the interests of employees than beneficial.

Consequently, this Comment has a dual purpose. First, it advocates for legislative action. The Nebraska legislature must amend its workers' compensation statutes so that employers can confidently im-

5. *See, e.g.*, *Irving*, 2010 WL 25112340; *Thompson*, 1991 WL 89668; Gen. Motors Corp. v. Smith, 1987 WL 11460 (Del. Super. Ct. May 26, 1987); Barner v. Sunflower Carriers & Transp. Claims, Inc., No. A-01-299, 2002 WL 205769 (Neb. Ct. App. Feb. 12, 2002); *Milwaukee*, 1983 WL 161498.

6. The term "modified duty off-site" was taken from the return-to-work program established at Alro Steel Company and discussed in *State ex rel. Sebring v. Industrial Commission*, 915 N.E.2d 643, 644 (Ohio 2009). *See also* Gay v. Teleflex Auto., No. 3:06-CV-7104, 2008 WL 896946, at *2 (N.D. Ohio Mar. 28, 2008) (referring to the program as "modified off-duty site"); *Modified Duty Off-Site*, VocWorks, http://www.vocworks.com/modified-duty-off-site-program (last visited Oct. 4, 2011) (referring to the program as "Modified Duty Off-Site"). The program is also known by many other names, such as: "Employee Lending," see Crystal Witham, *Consider Employee Lending to Return Employees to Work*, Int'l Risk Mgmt. Inst. (Aug. 19, 2009), http://www.irmi.com/newsletters/irmiupdates/2009/0212-risk-management.aspx#risktip; "Temporary Transitional Employment," see *Temporary Transitional Employment*, Cascade Disability Management, Inc., http://www.cascadedisability.com/trans_employment.php (last visited Oct. 4, 2011); and "Charitable Work," see *ReadyReturn: SeaBright's Transitional Return to Work Program*, Sea Bright Ins. Company, http://www.sbic.com/readyreturn.html (last visited Oct. 4, 2011). Because the name "modified duty off-site" has been referenced in previous court opinions, the program will be referred to as such. Furthermore, no disability management company is endorsed by such a reference.

7. *See Modified Duty Off-Site*, *supra* note 6.

8. *See, e.g.*, Cascade Disability Mgmt., Inc., Cascade's Temporary Transitional Employment Program: Temporary Transitional Employment Placements 2 (Cascade Disability Mgmt., Inc. ed., March 2008) [hereinafter Cascade Program] (on file with author and Nebraska Law Review) (describing two different examples in Nebraska of employers establishing an MDOS-type program).

9. *See infra* Parts III–IV.

10. *See, e.g.*, Thomsen v. Sears Roebuck & Co., 192 Neb. 236, 241, 219 N.W.2d 746, 749 (1974) ("Courts generally have been liberal in protecting workers." (quoting Indus. Comm'n v. Golden Cycle Corp., 246 P.2d 902, 904 (Colo. 1952))).

plement MDOS programs as part of their broader return-to-work policies. Second, even if such legislative action is not taken, the Comment demonstrates how Nebraska law still permits MDOS programs. Part II discusses ERTW programs, the supporting law for such programs, and the status of the law regarding MDOS programs nationally. Part III analyzes the status of the law in Nebraska concerning MDOS programs and—due to the absence of any clear direction—advocates for legislative action. Part IV argues that Nebraska courts should nonetheless support MDOS programs even if legislative action is not taken because Nebraska law inferentially supports the practice.

## II. EARLY-RETURN-TO-WORK (ERTW) AND MODIFIED DUTY OFF-SITE (MDOS) PROGRAMS

Workplace injuries can threaten the viability of a business.[11] An injury can create a domino effect of losses, leaving many companies feeling powerless to control the associated costs.[12] In essence, injuries lead to a decreased workforce, significant harm to the injured employee's wellbeing,[13] increased costs associated with one or more of the existing disability benefit systems,[14] and other injury-related costs such as indemnity payments and medical or legal expenses.[15] Businesses have shut down because they could not afford these exorbitant costs.[16] Furthermore, such costs naturally deter prospective businesses from even starting.[17] Fortunately, there is a way to control, or at least minimize, these costs: ERTW programs.

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11. *See* ROBERT A. MOSLEY, EFFECTS OF AN EARLY RETURN-TO-WORK PROGRAM ON THE COSTS OF WORKERS' COMPENSATION 1 (2003) (Ohio State Univ. ed., 2003) (on file with author and Nebraska Law Review).
12. *See id.*
13. Am. Coll. of Occupational & Envtl. Med., *Preventing Needless Work Disability by Helping People Stay Employed*, 48 J. OCCUPATIONAL & ENVTL. MED. 972, 976 (2006). When employees are injured on a long-term basis, many will lose social relationships with co-workers, self-respect that comes from earning a living, and what they do for a living—a "major identity component." *Id.*
14. *Id.* at 972. For example, "sick leave, workers' compensation, short-term disability, long-term disability, Social Security Disability Insurance, the Family Medical Leave Act, or the Americans with Disabilities Act (ADA)." *Id.* These disability benefits systems are estimated to exceed $100 billion in total annual cost. *Id.*
15. MOSLEY, *supra* note 11, at 1. One study found that some injury-related costs are even somewhat amplified during a recession because of employees' moral hazard. FRANK A. SCHMID, NAT'L COUNCIL ON COMP. INS., INC., WORKPLACE INJURIES AND JOB FLOWS 1 (Nat'l Council on Comp. Ins., Inc. ed., 2009) (on file with author and Nebraska Law Review). But the moral hazard effect can be somewhat lessened by the slowdown in job creation, which "depresses [the workplace injury and illness incident] growth rate by reducing the proportion of workers of short job tenure." *Id.*
16. MOSLEY, *supra* note 11, at 5.
17. *Id.*

### A. ERTW Programs

ERTW programs temporarily return injured employees back to the workforce in a light-duty capacity that meets the employee's medical restrictions.[18] In doing so, these programs provide numerous benefits, such as increasing employee morale, decreasing the costs of temporary employment, and reducing the amount of workers' compensation payments. These benefits are best illustrated by the following example.

In early 2007, saddled with nearly $10 million per year in workers' compensation costs, Ohio State University decided to significantly change its disability management policy.[19] The university "turned to a novel idea: moving ill and injured workers to less-demanding jobs instead of leaving them at home while they recover."[20] In a little over a year, the university reassigned 500 injured or ill employees—about ninety-five percent of its injured work force—to lighter-duty jobs.[21] Those jobs included blacking out social security numbers on documents, taking magazines to patients in the medical center, and enforcing the college's no-smoking policy.[22] The university avoided the workers' compensation system by paying the employees their regular pay regardless of where they were reassigned.[23]

At the end of its first year, the ERTW program saved Ohio State University $4 million—over twice as much as the college anticipated.[24] Tori Weeks, who oversaw the program, noted the $4 million figure did not even include savings from projected reductions in workers' compensation insurance premiums.[25] She estimated that lower premiums would produce approximately $500,000 in savings and save $1.5 million annually within five years of implementing the program.[26]

The program also helped maintain a happy work force.[27] Instead of receiving seventy-two percent of their wages while on workers' compensation, the injured employees received their regular pay.[28] The

18. WORKERS' COMP. GUIDE § 6:4 (Thomson Rueters ed., Westlaw current through August 2011) [hereinafter WORKERS' COMP. GUIDE].
19. Encarnacion Pyle, *Injured OSU Workers Shift to Light Duty as They Heal*, COLUMBUS DISPATCH (Feb. 25, 2008, 9:06 AM), http://www.dispatch.com/live/content/local_news/stories/2008/02/25/keep_working.ART_ART_02-25-08_B1_OL9EVVJ.html?sid=101.
20. *Id.*
21. *Id.* The other five percent were too badly injured for even light-duty assignments, such as data entry. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

program made them feel more productive and happier.[29] They had less time to sit at home, worry about their injury, and wonder whether their employer would accept them upon return.[30] The ERTW program therefore benefited both the employer and the employee alike.

As illustrated, an ERTW program is part of a company's broader disability management. ERTW programs help lower the amount of time an injured worker is absent from the workplace, thereby enabling the employer to control costs associated with workplace injuries.[31] The employee likewise remains active while out of work, thereby retaining a positive "work ethic."[32] For instance, a 2003 study indicated that injured workers do not miss work for extended periods of time when they have management and labor support as well as a formalized, written return-to-work agreement.[33] In contrast, the longer employees are absent from the workplace, the less motivation they will have to return.[34] Additionally, ERTW programs help control an employer's workers' compensation costs by reducing the amount of time an employee is eligible for benefits.[35] Because of this, ERTW programs are the most important factor influencing lowered workers' compensation costs.[36]

### *1. The California Study*

In 2004, because of the numerous benefits associated with return-to-work programs, California partly reformed its workers' compensation system in order to encourage the practice.[37] A California-en-

29. *Id.*
30. *Id.*
31. MOSLEY, *supra* note 11, at 3; SETH A. SEABURY ET AL., RAND CTR. FOR HEALTH AND SAFETY IN THE WORKPLACE, WORKERS' COMPENSATION REFORM AND RETURN TO WORK: THE CALIFORNIA EXPERIENCE 2 (RAND ed., 2011) ("Improved return to work can benefit employers [by] . . . reducing temporary and permanent-disability payments, reducing retraining costs and the lost employer investment in trusted employees, and reducing the potential for an adversarial relationship with the injured workers (which could lead to costly litigation).").
32. Martin v. Goodwill Indus. of S. N.J., Inc., 2008 WL 960684, at *1 (N.J. Super. Ct. App. Apr. 10, 2008).
33. MOSLEY, *supra* note 11, at 85. The "study consisted of 310 injured workers employed by the metropolitan municipalities of Cleveland and Toledo in the state of Ohio who were involved in a state-funded workers' compensation system and participated in an ERTW program between the years 1998 and 2000." *Id.* at 76.
34. *See* 106 CONG. REC. 6,934 (1999) (providing a statement of Sen. Edward Kennedy, who argued, in the context of social security and disability insurance, that "the longer an individual stays away from work, the less likely return to work will be").
35. *See* 2 DAN. J. TENNENHOUSE, ATTORNEYS MEDICAL DESKBOOK § 28:20 (4th ed. 2010). *But see id.* ("Premature return to work is a frequent cause of serious aggravation of the injury/illness and a resulting increase in disability.").
36. WORKERS' COMP. GUIDE, *supra* note 18, § 6:4.
37. *See* S.B. 899, 2004 Leg., 2003–04 Sess. (Cal. 2004).

dorsed study by the Rand Corporation Center for Health and Safety in the Workplace recently analyzed the effects of the statutory reforms and considered businesses' motivations behind implementing return-to-work programs.[38] California Senate Bill 899 created incentives for businesses to return injured employees back to work.[39] For example, the bill introduced a two-tier disability benefit, which entitled an employee to a fifteen percent increase in disability benefits if the employer did not offer a return-to-work option, and a fifteen percent decrease in benefits if the employer offered such an option—a thirty percent swing in benefit payments.[40]

Although the specific effects of the many 2004 California reforms were indistinguishable,[41] the Rand study did find evidence that at least medium-sized firms responded by improving their return-to-work policies.[42] Furthermore, the study reached two main conclusions regarding businesses' motivations in implementing return-to-work programs. First, injuries have a significant and persistent impact on a business's earnings.[43] Second, reducing workers' compensation costs is an important factor driving return-to-work decisions.[44] What's more, over ninety percent of large firms and over seventy percent of small firms that responded to the study agreed with the second proposition.[45]

Clearly, then, although the effects of the California reforms could not be adequately separated, injuries escalate workers' compensation costs and firms make return-to-work decisions based partly on those costs. State legislatures can therefore help employers and employees realize these dual ERTW benefits by creating a regulatory environment that is friendlier or more conducive to return-to-work programs, thereby enabling employers to return their employees to work as fast as is medically permissible.

38. SEABURY ET AL., *supra* note 31, at 2.
39. Cal. S.B. 899.
40. *Id.*; SEABURY ET AL., *supra* note 31, at 19. These benefits were only available to workers who were injured at employers with at least fifty workers. Cal. S.B. 899, at 20. Small business employers (less than fifty employees) were entitled to subsidies of $1,250 for a temporarily disabled worker and $2,500 for a permanently disabled worker. *Id*. at 219.
41. SEABURY ET AL., *supra* note 31, at 67.
42. *Id*.
43. *See id*. at 49 fig.6.2.
44. *See id.* at 40 tbl.5.3.
45. *Id.*

*2. ERTW is in Accord with the Law*

Nebraska,[46] as well as many other states,[47] specifically permits ERTW programs—in fact, no state has rejected the programs. Nebraska's statutes, for example, discuss such programs in the context of a company's certified, "managed care plan."[48] The workers' compensation court certifies a managed care plan if the plan satisfies certain statutory requirements.[49] One such requirement is that the plan provide "aggressive case management for injured employees and . . . a program for early return to work."[50]

Likewise, Montana went so far as to codify ERTW programs as one of the main purposes behind its workers' compensation statutes.[51] In 1987, the Montana legislature overhauled its workers' compensation system and declared it a public policy to return injured employees to work as soon as possible:

> For the purposes of interpreting and applying this chapter, the following is the public policy of this state:
>
> . . . .
>
> (3) A worker's removal from the workforce because of a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, *an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease*.[52]

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46. NEB. REV. STAT. § 48-120.02 (Reissue 2010); NEB. WORKERS' COMP. CT. R.P. 53(J–K); Manchester v. Drivers Mgmt., L.L.C., 278 Neb. 776, 781–82, 775 N.W.2d 179, 184 (2009) (quoting the trial judge, who stated that when an employee is injured, the employer has two choices: it can "put the employee to work in a light duty position or pay workers' compensation benefits"); *see also* Land v. Alegent Health, No. 202-1477 (Neb. Workers' Comp. Ct. Apr. 11, 2003) ("[D]efendant had provided accommodated employment within [the plaintiff's] restrictions through an early return to work program. . . . Defendant therefore has no obligation to provide plaintiff vocational rehabilitation.").
47. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1048 (1995 & Supp. 2011); CAL. LAB. CODE § 139.47 (West 2003 & Cum. Supp. 2010); COLO. REV. STAT. § 8-42-105 (2011); IOWA CODE ANN. § 85.33 (2009); ME. REV. STAT. tit. 39-A, § 214 (2001 & Supp. 2009); MICH. COMP. LAWS § 418.301 (West, Westlaw through 2011 legislation); WASH. REV. CODE § 51.32.090 (2010).
48. NEB. REV. STAT. § 48-120.02.
49. *Id.* § 48-120.02(2).
50. *Id.* § 48-120.02(2)(f).
51. MONT. CODE ANN. § 39-71-105 (2005); *see also* ARK. CODE ANN. § 11-9-1001 (2002 & Supp. 2009) ("The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is . . . to return the worker to the work force."); NEB. REV. STAT. § 48-162.01(1) ("One of the primary purposes of the Nebraska Workers' Compensation Act is restoration of the injured employee to gainful employment.").
52. MONT. CODE ANN. § 39-71-105(3) (emphasis added); *see also* Henry v. State Comp. Ins. Fund, 982 P.2d 456, 460 (Mont. 1999) (discussing the Montana policy to return injured workers to work as soon as possible).

In application, most states that expressly permit ERTW programs consider a modified return-to-work position as a bona fide job offer.[53] If the wage offered is lower than the pre-injury wage, the employer typically must pay a percentage of the difference via disability benefits.[54] The modified position will often be permitted only if it meets certain criteria, such as remaining "within a reasonable distance from that employee's residence."[55]

It is not just state legislatures that have recognized the importance of ERTW programs. Courts have long understood it is sound policy to return injured employees to work "at the earliest possible date,"[56] and ERTW programs are therefore not only sound policy from a business standpoint, but they are also "to the advantage of the injured employee."[57] The Supreme Judicial Court of Maine, for example, ruled workers' compensation "is intended to encourage injured employees to return to work."[58] In *Holt v. School Administrative District No. 6*,[59] Stephanie Holt suffered a compensable injury to her knee while employed as the head of the English department for Bonny Eagle High School.[60] Her employer made some workplace modifications to accommodate her medical restrictions and she was able to continue her employment as a result.[61] Shortly thereafter, Holt began a paid, administrative leave—for reasons unrelated to her injury—and she voluntarily resigned several months later.[62]

Holt later petitioned the workers' compensation board for an award of compensation based upon her earlier injury.[63] Her employer, however, argued that Holt's voluntary resignation constituted a refusal of a bona fide offer of employment pursuant to Maine Revised Statute section 214(1)(A).[64] The court first looked to section 214, which states the following:

53. *See, e.g.*, IOWA CODE ANN. § 85.33(1) (2009); MICH. COMP. LAWS § 418.301(9)(a) (West, Westlaw through 2011 legislation).
54. *See, e.g.*, IOWA CODE ANN. § 85.33(3–4); MICH. COMP. LAWS § 418.301(9)(c) ("If . . . the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits . . . equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage that the injured employee earns after the date of injury. . . .").
55. ME. REV. STAT. tit. 39-A, § 214(5) (2001 & Supp. 2009).
56. *In re* Kelley, 116 N.E. 306, 308 (Ind. Ct. App. 1917).
57. *Id.*
58. Holt v. Sch. Admin. Dist. No. 6, 782 A.2d 779, 781 (Me. 2001) (quoting Loud v. Kezar Falls Woolen Co., 735 A.2d 965, 967 (Me. 1999)).
59. *Id.*
60. *Id.* at 780.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

> If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services and the employee refuses that employment without good and reasonable cause, the employee is considered to have voluntarily withdrawn from the work force and is no longer entitled to any wage loss benefits under this Act during the period of the refusal.[65]

The court then ruled that the school offered Holt reasonable employment and she withdrew herself from the workforce when she voluntarily resigned without reasonable cause.[66] She was therefore no longer entitled to compensation under the statute.[67] In so ruling, the court discussed the purpose of section 214(1)(A), stating:

> [T]he purpose of section 214(1)(A) is to provide an opportunity for employers to mitigate workers' compensation benefits by offering injured employees reinstatement employment. The statute is also intended to encourage injured employees to return to work. Accordingly, once the employer makes a bona fide offer of reasonable employment, the employee is subject to a reciprocal obligation to accept that offer, absent good and reasonable cause for refusal.[68]

Thus, workers' compensation statutes are meant to (1) benefit injured employees by returning them to the workforce, and (2) benefit employers by helping them mitigate the compensation expenses they pay to injured employees—which expenses are further mitigated by allowing employees to become economically productive again.

The Wisconsin Court of Appeals has also determined its workers' compensation statutes are designed to return injured employees back to work.[69] In *Metal-Era Inc. v. Department of Industry, Labor & Human Relations*, Albert Keepman injured his back while working for Metal-Era, Inc.[70] Metal-Era paid temporary disability benefits until he was released for work by the treating physician.[71] When he later attempted to return to work, a supervisor informed him that Metal-Era was not hiring back any person who was injured on the job, even though the company had suitable employment available.[72] The court ruled Metal-Era had a duty to rehire Keepman, absent "reasonable cause."[73] The court reasoned that one of the purposes behind Wisconsin's workers' compensation laws is "to return the injured employee back to work with his or her former employer provided there are positions available [and] the injured employee can do the work."[74] The

65. ME. REV. STAT. tit. 39-A, § 214(1)(A) (2001 & Supp. 2009).
66. *Holt*, 782 A.2d at 782.
67. *Id.*
68. *Id.* at 781 (quoting Loud v. Kezar Falls Woolen Co., 735 A.2d 965, 967 (Me. 1999)).
69. Metal-Era, Inc. v. Dep't of Ind., Labor & Human Relations, 394 N.W.2d 317 (Wis. Ct. App. 1986) (unpublished table decision).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*

available employment must also be "within the injured employee's physical and mental limitations."[75]

State legislatures and courts have consistently concluded that workers' compensation laws are designed to return injured workers to the work place. Courts have noted[76] the dual benefit behind ERTW programs: the benefit to the injured employee in returning to the work force and the benefit to the employer in mitigating compensation exposure. ERTW programs are the means by which employers and employees can recognize these benefits. Many employers, however, can only accomplish this through an MDOS program.

## B. MDOS Programs

Workplace injuries can often restrict an employee from returning to his or her previous work assignment within the firm. In those situations, employers must find alternative work that the injured employee can perform within his or her medical restrictions. Often, such alternative "light-duty" work can be found within the firm. For example, various clerical duties that do not require the physical demands of the previous position. On the other hand, the structure of many businesses prevents them from providing alternative work assignments.[77] If such positions are not available, the employer cannot utilize a valuable, cost-containing tool.

MDOS programs are a solution to help these businesses enjoy the benefits of ERTW programs. Under a typical MDOS program, when an employee is injured, a physician first determines the physical limitations of the individual.[78] If the employer cannot accommodate the employee's limitations, the employer offers a paid position at a local charity or nonprofit organization.[79] That organization therefore receives a free volunteer who can, for example, answer phones, schedule interviews, perform light janitorial tasks, and sell items in the organization's stores.[80] The employer's job offer with the organization is intended as a bona fide offer of employment while the employee recovers, divesting the employee of workers' compensation benefits.[81]

75. *Id.*; *accord* Comet, Inc. v. Labor & Indus. Review Comm'n, 371 N.W.2d 429 (Wis. Ct. App. 1985).
76. *See supra* notes 56–75 and accompanying text.
77. *See supra* note 5 and accompanying text.
78. *See, e.g.*, Gay v. Teleflex Auto., No. 03-CV-7104, 2008 WL 896946, at *2 (N.D. Ohio Mar. 28, 2008).
79. *See, e.g.*, *id.*
80. Witham, *supra* note 6.
81. *See, e.g.*, MICH. COMP. LAWS § 418.301(9)(a) (West, Westlaw through 2011 legislation) (divesting an employee of his or her wage loss benefits if he or she receives a bona fide offer of reasonable employment from the previous employer or another employer).

Although the employee may physically work with the organization, he or she remains on the payroll of the pre-injury employer.[82]

Outside of the numerous benefits the employer and the injured employees receive when there is a speedy return to work,[83] MDOS programs provide a number of additional benefits to employers, insurers, charitable and nonprofit organizations, and the community.[84] Employers are seen as "good citizens" by offering their employees to local charitable organizations.[85] The charitable donation may even be tax deductible.[86] Insurers are better able to manage claim costs for the employer and can offer more affordable rates at the time of renewal.[87] Finally, the charitable or nonprofit organization, and community as a whole, benefit by receiving scarce volunteers for valuable services.[88]

Although an MDOS program provides countless benefits to all parties involved, state legislators, as well as state and federal courts, must validate the program. State statutes do not explicitly refer to MDOS-type programs.[89] Court opinions are scarce.[90] MDOS programs are in effect throughout the country even in the absence of this authority,[91] but businesses in need of MDOS programs would be more likely to implement the program if there was more judicial support and more liberal workers' compensation statutes.[92] As it now stands, the use of MDOS programs presents a risk: If courts challenge the program, such courts might preclude employers from utilizing the innovative disability management technique, thereby abrogating the effort, time, and resources a business might exert while developing an MDOS program.[93] In order to accurately assess this risk, it is accordingly important to understand how MDOS complies with federal law and to understand the legal framework that supports MDOS.

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82. CM-Services, Employee Lending Frequently Asked Questions (May 27, 2010) [hereinafter CM-Services: FAQ] (on file with CM-Services and Nebraska Law Review).
83. *See supra* section II.A.
84. *See* CM-Services, Employee Lending: Innovative Solutions in Challenging Workers' Comp. Cases (April 14, 2009) [hereinafter CM-Services: Lending] (on file with CM-Services and Nebraska Law Review).
85. *Id.*
86. *Id.* The tax implications of MDOS programs are outside the scope of this Comment.
87. *Id.*
88. *See id.*
89. *See infra* subsection II.B.2.
90. Only three cases have been found that refer to MDOS-type programs. *See infra* subsection II.B.3.
91. *See, e.g.*, CASCADE PROGRAM, *supra* note 8, at 2.
92. *See* WORKERS' COMPENSATION REFORM, *supra* note 31, at 67 (finding that at least medium-sized firms responded to return-to-work statutory reforms by improving their return-to-work policies).
93. For example, Nebraska workers' compensation laws and court rulings do not discuss the practice either way.

*1. Compliance with Federal Law: ADA and FMLA*

MDOS programs, as described above,[94] are compatible with both the Americans with Disabilities Act[95] (ADA) and the Family and Medical Leave Act[96] (FMLA). The ADA prohibits employers from discriminating against disabled employees in the workplace.[97] In relation to return-to-work, the ADA prohibits discrimination on the basis of the terms, conditions, and privileges of employment.[98] An employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]."[99]

Commentators have asserted this "reasonable accommodation" provision precludes employers from placing injured employees in "make-work" positions as part of the employees' light-duty assignments.[100] These commentators argue the light-duty assignment must "make a real contribution to the bottom line, and require marketable skills the employee could use to secure a position at another company if the present job came to an end."[101] As applied to MDOS programs, however, such an argument likely fails for two reasons. First, the *Act* defines "reasonable accommodation" to include job restructuring, modified work schedules, and other similar accommodations.[102] MDOS programs fit that description because they accommodate injured employees by temporarily restructuring their job responsibilities.[103] Second, if a company shows it cannot accommodate injured employees with assignments that "make a real contribution to the bottom line" without undue hardship, then the Act likely will not preclude the company from requiring employees to perform make-work-type tasks with a nonprofit organization because the Act does not mandate work *within the company* if there is a showing of undue hardship.[104]

The FMLA, on the other hand, requires larger employers to allow seriously injured employees a total of twelve workweeks of leave dur-

94. *See supra* section II.B.
95. 42 U.S.C. §§ 12101–12213 (2006 & Supp. III 2009).
96. 29 U.S.C. §§ 2601–2654 (2006 & Supp. III 2009).
97. 42 U.S.C. § 12112(a). The ADA only applies to businesses with fifteen or more employees for twenty or more calendar weeks. *Id.* § 12111(5)(A).
98. *Id.* § 12112(a).
99. *Id.* § 12112(b)(5)(A).
100. *See, e.g.*, 2 HR SERIES: COMPENSATION AND BENEFITS § 22:187 (West, Westlaw current through Sept. 2011).
101. *Id.*
102. 42 U.S.C. § 12111(9)(B).
103. *See supra* section II.B.
104. 42 U.S.C. § 12112(b)(5)(A).

ing any twelve-month period.[105] The employer is not required to pay the injured employee during this time.[106] But after the leave period, the employee is entitled to be restored to his or her previous position, or an equivalent one.[107] Employers utilizing MDOS programs should therefore be mindful of an employee's right to this leave period; if an employee rejects an MDOS-program-offer and instead takes his or her statutorily-permitted leave, the employer may not terminate that employee.[108]

*2. Statutory Support for MDOS Programs*

As for state statutory support, state legislatures have not yet explicitly permitted the use of MDOS programs, but many state statutes appear more welcoming of the program than others.[109] The Michigan statutes, for example, appear more lenient.[110] A bona fide job offer can come from *either* the previous employer, a different employer, or through the Michigan Employment Security Commission.[111] In the event an injured employee receives a job offer "of reasonable employment"[112] from any one of these sources, the employee must accept the offer, or he or she "shall be considered to have voluntarily removed himself or herself from the work force and is not entitled to any wage loss benefits."[113]

On the other hand, the State of Washington has a more restrictive workers' compensation system.[114] The state permits disability benefits to continue "until the worker is released by his or her physician . . . for the work, and begins the work *with the employer of injury*."[115] In other words, if an employer wants to fully mitigate workers' compensation expenses, the injured employee must return to work *for that employer* in order to withhold workers' compensation benefits.

In an MDOS program, an injured employee would still technically remain employed by the pre-injury employer, even though the em-

105. 29 U.S.C. § 2612(a)(1)(D).
106. *Id.* § 2612(c).
107. *Id.* § 2614(a)(1).
108. *Id.* § 2615(a).
109. *See, e.g.*, COLO. REV. STAT. § 8-42-105 (2011) (discussing offers of modified employment); MICH. COMP. LAWS § 418.301 (West, Westlaw through 2011 legislation) (same).
110. MICH. COMP. LAWS § 418.301.
111. *Id.* § 418.301(9)(a); *see also* ME. REV. STAT. tit. 39-A, § 214(1)(A) (2001 & Supp. 2009) ("If an employee receives a bona fide offer of reasonable employment from the previous employer or another employer or through the Bureau of Employment Services . . . .").
112. MICH. COMP. LAWS § 418.301(9).
113. *Id.* § 418.301(9)(a).
114. WASH. REV. CODE § 51.32.090(4) (2010).
115. *Id.* (emphasis added).

ployee would be doing work for a charitable or nonprofit organization.[116] Unfortunately, however, Washington courts could potentially interpret the statute as literally requiring the employee to begin *work with the employer of injury*, instead of merely remaining on the payroll of the employer. In that respect, it is essential that state legislatures clearly define a bona fide offer of employment to include work with charitable and nonprofit organizations.

*3. Judicial Support*

Although MDOS programs are currently being practiced throughout the country,[117] most state and federal courts have yet to rule on the permissibility of the programs.[118] A couple Ohio court opinions[119] and a New Jersey unpublished opinion[120] are three of the very few decisions on MDOS-program-availability. These opinions should serve as persuasive support for the return-to-work program, if and when other state and federal courts determine whether to permit it.

*i.* State ex rel. Sebring v. Industrial Commission

The Ohio Supreme Court recently determined whether an MDOS-program-job-offer was considered suitable employment, thereby terminating the temporary total disability benefits of an injured employee according to Rule 4121-3-32(B) of the Ohio Administrative Code.[121] In *State ex rel. Sebring v. Industrial Commission*, William Sebring sprained his lower back while working for Alro Steel Corporation in Toledo, Ohio.[122] A month later, he returned to his former position of employment, was subsequently laid off, yet never alleged the lay-off was due to the injury.[123]

A month after being laid off, Sebring's wife accepted a job in Cheyenne, Wyoming, and the two moved to Cheyenne.[124] Sebring was then recalled from his layoff, but informed Alro Steel that he would

116. *See* CM-Services: Lending, *supra* note 84.
117. *See supra* note 6 (providing examples of disability management companies that offer such services). Cascade Disability Management has even posted examples of the work it has done in most states. *See* CASCADE PROGRAM, *supra* note 8, at 2.
118. Only three cases have been found that discuss the practice: *Gay v. Teleflex Automotive*, No. 3:06-CV-7104, 2008 WL 896946 (N.D. Ohio Mar. 28, 2008), *Martin v. Goodwill Industries of Southern New Jersey, Inc.*, 2008 WL 960684 (N.J. Super. Ct. Apr. 10, 2008), and *State ex rel. Sebring v. Industrial Commission*, 915 N.E.2d 643 (Ohio 2009).
119. *Gay*, 2008 WL 896946; *Sebring*, 915 N.E.2d 643.
120. *Martin*, 2008 WL 960684.
121. *Sebring*, 915 N.E.2d at 647.
122. *Id.* at 644.
123. *Id.*
124. *Id.*

not return to work.[125] Months later, Sebring brought a claim for temporary, total disability compensation from Alro, and the Industrial Commission of Ohio granted his request; but contingent upon his submission of medical proof.[126] Sebring's doctor released him for light-duty work, which prompted two offers from Alro.[127]

Alro first offered Sebring a light-duty position in Cheyenne with Goodwill Industries, according to Alro's MDOS program.[128] The company's offer of modified employment stated that Sebring was to report to Goodwill for a meeting and that his "refusal of the MDOS placement may result in termination of all Workers' Compensation benefits."[129] He responded to the offer by stating he would not attend the scheduled meeting because he was going to be in Ohio for several weeks.[130] Sebring was offered a second position of light duty—this time with Alro—upon returning to the Toledo plant to pick up a check.[131] He refused the second offer, however, because he was going back to Cheyenne.[132]

Based upon Sebring's refusal to accept light-duty work, Alro moved to terminate Sebring's temporary total disability compensation.[133] The company relied on subsection 4121-3-32(B)(1) of the Ohio Administrative Code:

> Temporary total disability may be terminated by a self-insured employer or the bureau of workers' compensation in the event of any of the following:
> (a) The employee returns to work.
> (b) The employee's treating physician finds that the employee is capable of returning to his former position of employment or other available suitable employment.[134]

The hearing officer granted the motion and the court of appeals affirmed.[135] The lower court focused mainly on whether the job offer in Toledo was a suitable employment offer, considering Sebring lived in Cheyenne at the time.[136] The Ohio Supreme Court, however, refused to discuss that issue in depth because it found *both* the Toledo and Cheyenne job offers were valid.[137] This meant there *was* a job offer proximate to his Cheyenne residence:

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 644–45 (internal quotations omitted).
130. *Id.* at 645.
131. *Id.*
132. *Id.*
133. *Id.*
134. OHIO ADMIN. CODE 4121-3-32(B)(1) (2006).
135. *Sebring*, 915 N.E.2d at 645–46.
136. *Id.* at 646–47.
137. *See id.* at 647.

> We find it unnecessary to address these arguments at the present time. Alro secured jobs for Sebring *both* in Toledo *and in* Cheyenne, and Sebring refused both. Regardless of which place is deemed to be his residence for purposes of Ohio Adm. Code 4121-3-32(A)(6), *Sebring refused job offers that were proximate to each*. Thus, there is no need for analysis of this issue to proceed further.[138]

In essence, the court ruled the MDOS program position with Goodwill Industries was a valid, suitable job offer.[139] Though the court did not provide much reasoning as to why the MDOS program position was a suitable offer, the ruling provides strong support for allowing such programs. It would be strange for courts to preclude workers' compensation benefits based upon the validity of a job offer within an MDOS program, but then turn around and hold that an MDOS program is not even permissible under the applicable workers' compensation statutes.

*ii.* Gay v. Teleflex Automotive

Teleflex Automotive Group, Inc. also implemented an MDOS program as part of its return-to-work policy.[140] Robert Gay, an African-American, was injured while working as a general operator for Teleflex.[141] A physician ordered him to restrict the use of his right arm for six months, but he was permitted to work in a light duty position sometime thereafter.[142] Teleflex was unable to accommodate Gay's restrictions, and he was assigned to Teleflex's MDOS program at a local YMCA.[143] Gay was advised that he would lose his workers' compensation benefits if he failed to take the MDOS program assignment.[144]

Gay brought suit in federal court for racial discrimination and argued that Theresa Atkins, a Caucasian co-worker, was accommodated at Teleflex for more than three years so that she could recover appropriately.[145] Gay, on the other hand, was the first employee to be assigned to the community nonprofit agency.[146] His charge of racial discrimination was "based on [his] assignment to, and work assignments at, the off-sight MDOS program."[147]

Part of Gay's burden of proof was to show (1) "that he suffered an adverse employment action," and (2) "that a person outside the pro-

138. *Id.* (emphasis added).
139. *See id.*
140. Gay v. Teleflex Auto., No. 2:06-CV-7104, 2008 WL 896946, at *2 (N.D. Ohio Mar. 28, 2008).
141. *Id.* at *1.
142. *Id.* at *1–2.
143. *Id.* at *2.
144. *Id.*
145. *Id.* at *2–4.
146. *Id.* at *4.
147. *Id.* at *6.

tected class was treated more favorably than him."[148] The first requirement could be satisfied by showing "a materially adverse change in the terms and conditions of [Gay's] employment."[149] In determining whether Teleflex's MDOS program offer with the YMCA satisfied this requirement, the court quoted the magistrate judge's analysis:

> [T]he work program was authorized by company policy. Plaintiff maintained his employment status with Defendant and he was covered under the company's labor agreement. The YMCA accommodated his physical restrictions. Plaintiff was paid at the same rate that he would earn if he had been working at the plant. He was not demoted and he did not lose material benefits or standing as a result of the assignment.[150]

The court concluded by stating that although Gay's assignment changed the physical location where he worked, "it did not modify the terms or conditions of his employment."[151] As a result, Teleflex's MDOS-program-job-offer was not found to be an adverse employment action.[152]

Gay also failed to establish the second requirement.[153] He had to show "*either* that [he] was replaced by a person outside of the protected class *or* that similarly situated non-protected employees were treated more favorably than [him]."[154] Gay's only evidentiary support for this requirement was that he was the only person reassigned to work outside the facility, which is proof of disparate treatment.[155] The court, however, was not persuaded by the argument.[156] It subsequently ruled that his claim for racial discrimination failed because Gay could not establish both that he had suffered an adverse employment action and that a person outside his protected class was treated more favorably than him.[157] Thus, in reaching this decision, the court did not—in any way—discuss whether the MDOS program to which Gay was assigned was violative of the state's workers' compensation statutes. To the contrary, the court held the MDOS program did not violate statutory law, albeit a federal statutory law.

#### *iii.* Martin v. Goodwill Industries of Southern New Jersey, Inc.

Lastly, in *Martin v. Goodwill Industries of Southern New Jersey, Inc.*, Darryl Martin was employed by Sun Belt Rentals as a truck

148. *Id.* at *7 (quoting Braithwaite v. Timken Co., 258 F.3d 488, 493 (6th Cir. 2001)). These were two of the four required elements in his discrimination claim. *Id.*
149. *Id.* (quoting Hollins v. Atl. Co., 188 F.3d 652, 662 (6th Cir. 2002)).
150. *Id.* (internal quotation marks omitted).
151. *Id.* (internal quotation marks omitted).
152. *Id.*
153. *Id.* at *8.
154. *Id.* (quoting Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995)).
155. *Id.*
156. *Id.*
157. *Id.*

driver when he was injured while working.[158] Sun Belt did not have any light-duty work available to meet Martin's medical restrictions, so the company arranged for him to work light-duty at a local Goodwill store.[159] This light-duty work helped Martin "remain active while out of work and retain a 'work ethic.'"[160] Sun Belt continued to pay Martin's full salary in place of workers' compensation benefits.[161]

While working at Goodwill, Martin was injured when he fell on its premises.[162] He brought a personal injury action against Goodwill.[163] On a motion for summary judgment, the Superior Court of New Jersey, Law Division, ruled that Goodwill was protected by the New Jersey charitable immunity statute and dismissed the case; the Appellate Division affirmed on appeal.[164] Again, the appellate court never acknowledged that the permissibility of the return-to-work program was in question—the only issue was whether the charitable organization would be liable for work-related injuries on its premises.[165]

#### *iv. What We Learn From* Sebring*,* Gay*, and* Martin

These three cases provide strong support for MDOS programs. Not only did these three different courts permit the programs, but two of the courts did so in seemingly extreme situations. In *Sebring*, the court validated an MDOS program job offer in a completely different state than the pre-injury employer.[166] In *Gay*, the court validated Teleflex's initial use of the program in a racially charged situation.[167] The court in *Gay* even went so far as to discuss *why* the MDOS program position was not an adverse employment action: the program was part of the company's return-to-work policy; Gay maintained his employment status; the position accommodated his physical restrictions; he was paid the same amount as his pre-injury wage; he was not demoted; and he did not lose any benefits.[168] In *Martin*, moreover,

158. Martin v. Goodwill Indus. of S. N.J., Inc., 2008 WL 960684, at *1 (N.J. Super. Ct. App. Div. Apr. 10, 2008).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*; *see also infra* subsection IV.B.2 (discussing how a company in Nebraska can structure its MDOS program to shield the charity or nonprofit organization from workers' compensation liability). *But see* Myers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966) (abrogating the previously protected charitable immunity of hospitals from tort liability).
166. State *ex rel*. Sebring v. Indus. Comm'n., 915 N.E.2d 643 (Ohio 2009).
167. Gay v. Teleflex Auto., No. 3:06-CV-7104, 2008 WL 896946, at *15 (N.D. Ohio Mar. 28, 2008).
168. *Id.* at *7.

the court kept the MDOS program intact even in light of the employment issues which could have entangled the analysis.[169]

## III. NEBRASKA LAW DOES NOT SPECIFICALLY MENTION MDOS PROGRAMS

Although Nebraska statutes permit employers to establish ERTW programs,[170] they are silent when it comes to MDOS programs. Generally, an offer of employment will end disability payments.[171] For total disability, an employer must pay the compensation until the disability ceases.[172] The disability ceases when the injured employee is able to "earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform."[173] In other words, when the employee returns to work.

For partial disability, the employer pays sixty-six and two-thirds percent of the difference between the wages received at the time of the injury and the earning power of the employee after the injury, but not for more than 300 weeks.[174] If, after the injury, an injured employee receives wages equal to the wages received before the injury, "the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity."[175] The pre-injury employer's job offer to the employee should consequently have a significant impact on the amount of compensation benefits payable.

Since the revised statutes do not specifically mention MDOS programs, Nebraska businesses are at the mercy of the courts if they decide to implement MDOS programs. In order to reduce the risk of a court rejecting such a program, the Nebraska legislature must there-

169. *Martin*, 2008 WL 960684, at *1. Indeed, the court failed to address the applicability of the exclusivity provisions, choosing instead to determine whether Goodwill was an immune third party under the applicable charitable immunity statute. *See id.*

170. *See supra* subsection II.A.2.

171. *See* NEB. REV. STAT. § 48-121(1)–(2) (Reissue 2010).

172. *Id.* § 48-121(1).

173. Frauendorfer v. Lindsay Mfg. Co., 263 Neb. 237, 245, 639 N.W.2d 125, 135 (2002) (quoting Miller v. E.M.C. Ins. Cos., 259 Neb. 433, 440, 610 N.W.2d 398, 405 (2000)).

174. NEB. REV. STAT. § 48-121(2).

175. Kam v. IBP, Inc., 12 Neb. App. 855, 865, 686 N.W.2d 631, 639 (2004) (quoting Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 471, 461 N.W.2d 565, 574 (1990)). *But see* Akins v. Happy Hour, Inc., 209 Neb. 236, 239, 306 N.W.2d 914, 916 (1981) ("'Earning power,' as used in [section 48-121], is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.").

fore amend the workers' compensation statutes. Fortunately, the legislature can turn to other states' laws as a starting point.

As discussed earlier,[176] the Michigan statutes are a helpful guide.[177] Section 418.301 relieves the employer of workers' compensation payments when the employee receives a bona fide offer of reasonable employment from the previous employer or another employer.[178] This provision alone, however, may be insufficient to insure that MDOS programs are protected. The legislature must also make sure to define "reasonable employment" to include light-duty work with the pre-injury employer *as well as with any charity or nonprofit organization*. In effect, any proposed amendment will stop workers' compensation payments when the injured employee receives a job offer from *any* employer—which offer would include light-duty work with a charity or nonprofit.

If the Nebraska legislature desires further safeguards for the employee, the amendment could apply only to court certified plans. An employer could include an MDOS program as part of its section 48-120.02 modified care plan and the compensation court would then review the plan.[179] The legislature could also incorporate any other safeguarding provisions in subsection (2), which lists various requirements as prerequisites to certification.[180] In that manner, employers could certify their MDOS programs, and employees would be protected from possible usurpations by employers.

## IV. NEBRASKA LAW GENERALLY SUPPORTS MDOS PROGRAMS

Even in the absence of a legislative amendment, the Nebraska courts should nonetheless permit MDOS programs. Under Nebraska law, the Workers' Compensation Act must be liberally construed so that courts permit employer activity that aligns with the purposes of the Act.[181] Furthermore, Nebraska agency law—through the loaned servant doctrine—lends strong support to the practice[182] Since these

176. *See supra* subsection II.B.2.
177. MICH. COMP. LAWS § 418.301 (West, Westlaw through 2011 legislation).
178. *Id.* § 418.301(9)(a). But if the offer is less than the pre-injury wage, then the employer pays eighty percent of the difference. *Id.* § 418.301(9)(b).
179. NEB. REV. STAT. § 48-120.02(2).
180. *Id.*
181. *See* Jackson v. Morris Commc'ns Corp., 265 Neb. 423, 431, 657 N.W.2d 634, 640 (2003) (construing Nebraska's Workers' Compensation Act liberally in order to carry out the Act's purpose of "reliev[ing] injured workers from the adverse economic effects caused by a work-related injury or occupational disease"); Foote v. O'Neill Packing, 262 Neb. 467, 474, 632 N.W.2d 313, 320 (2001) ("[T]he [Workers' Compensation Act] should be broadly construed to accomplish the beneficent purpose of the act . . . .").
182. *See, e.g.*, Daniels v. Pamida, Inc., 251 Neb. 921, 561 N.W.2d 568 (1997).

two arguments are not exclusive to Nebraska law,[183] other state courts could use similar arguments in permitting MDOS programs.

### A. MDOS Programs Further the Purposes of the Workers' Compensation Act

It is well established that Nebraska's Workers' Compensation Act grants no authority beyond what is specifically legislated.[184] Therefore, an important question is whether an MDOS program is permissible in the absence of legislation. This principle, however, is typically used in the context of *constraining* judicial authority; it would not seem to preclude employer activity that does not contravene the purposes of the Act.[185]

In *Jackson v. Morris Communications Corp.*, the Nebraska Supreme Court permitted an injured employee's cause of action against her employer, even though the employee did not have a statutorily permitted cause of action against the employer under the Act.[186] The employee, Cathy Jackson, suffered an injury at work, reported the injury to her employer, and the employer filed an injury report.[187] She was an at-will employee and was later terminated when her physical therapist contacted her supervisor, recommending she not perform any repetitive duties with her injured wrist.[188]

Jackson alleged the employer discharged her because she was injured and because she filed a workers' compensation claim.[189] The trial court dismissed the action, stating the cause of action was not yet recognized by Nebraska law.[190] On appeal, the Nebraska Supreme Court first noted that "the effect of the substitution of workers' compensation for the common law was to eliminate a cause of action by an employee against his or her employer for work-related injuries."[191] In

183. *See, e.g.*, Ulstad v. Brenny, 645 N.W.2d 767 (Minn. Ct. App. 2002) (recognizing loaned servant doctrine in context of workers' compensation); Touchard v. La-Z-Boy, Inc., 148 P.3d 945 (Utah 2006) (permitting employee claim of wrongful discharge for filing workers' compensation claim even though claim fell outside Utah's Workers' Compensation Act).
184. *See, e.g.*, Bennett v. Saint Elizabeth Health Sys., 273 Neb. 300, 305, 729 N.W.2d 80, 84 (2007) ("[T]he Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for *any* injury arising out of and in the course of the employment." (internal quotation marks omitted)); Marlow v. Maple Manor Apartments, 193 Neb. 654, 657, 228 N.W.2d 303, 305 (1975) (same).
185. *See Jackson*, 265 Neb. at 431, 657 N.W.2d at 640; *Foote*, 262 Neb. at 474, 632 N.W.2d at 320.
186. 265 Neb. at 432, 657 N.W.2d at 641.
187. *Id.* at 424, 657 N.W.2d at 636.
188. *Id.* at 424–25, 657 N.W.2d at 636.
189. *Id.* at 425, 657 N.W.2d at 636.
190. *Id.*
191. *Id.* at 431, 657 N.W.2d at 640 (citing Leach v. Lauhoff Grain Co., 366 N.E.2d 1145 (Ill. App. Ct. 1977)).

other words, the cause of action was not explicitly permitted under the Act.

On the other hand, the court continued, a purpose behind the Workers' Compensation Act is "to relieve injured workers from the adverse economic effects caused by a work-related injury."[192] The Act was further created "to serve an important public purpose," which would be undermined by a rule that "allows fear of retaliation for the filing of a claim."[193] Consequently, the court permitted the cause of action, reasoning that "the unique and beneficent nature of the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception."[194]

*Jackson's* greatest value is its discussion of the two factors that influenced the decision to reach outside the Workers' Compensation Act and give injured employees an otherwise non-statutory cause of action. The court first found the cause of action aligned with the Act's legislatively pronounced purpose: "to relieve injured workers from the adverse economic effects caused by a work-related injury."[195] Second, the court found the cause of action appealed to Nebraska public policy.[196] MDOS programs certainly satisfy both of these purposes as well.[197]

The Nebraska legislature itself stated that one of the primary purposes of Nebraska's Workers' Compensation Act is to return injured employees to work.[198] MDOS programs return employees to the workplace faster than if those employees wait for a suitable and available light-duty position.[199] MDOS programs also appeal to Nebraska public policy. Rather than sitting idle, the employee remains productive, working within his or her restrictions—a benefit not only to the employer and employee, but to the community.[200] As discussed in *Gay*, MDOS programs can also be structured so that an employee maintains his or her employment status, receives the same rate of pay, is not demoted, and retains the material benefits or standing with the employer[201]—all of which benefit the employee.

192. *Id.* (citing Foote v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2002)).

193. *Id.* at 432, 657 N.W.2d at 640–41.

194. *Id.* at 432, 657 N.W.2d at 641.

195. *Id.* at 431, 657 N.W.2d at 640 (citing Foote v. O'Neill Packing, 262 Neb. 467, 632 N.W.2d 313 (2001)).

196. *Id.* at 432, 657 N.W.2d at 641.

197. *See supra* subsection II.A.2.

198. NEB. REV. STAT. § 48-162.01(1) (Reissue 2010).

199. *See supra* subsection II.B.

200. *See* CM-Services: Lending, *supra* note 84, at 1–2.

201. Gay v. Teleflex Auto., No. 3:06-CV-7104, 2008 WL 896946, at *7 (N.D. Ohio Mar. 28, 2008).

## B. The Loaned-Servant Doctrine Supports MDOS Programs

Nebraska agency law also lends strong support for MDOS programs via the loaned-servant doctrine. The loaned-servant doctrine clarifies the definition of an employer—for purposes of Nebraska's Workers' Compensation Act—when one company lends an employee to another company.[202] Section 48-114 begins the discussion by providing:

> The following shall constitute employers subject to the Nebraska Workers' Compensation Act: . . . (2) every person, firm, or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession as described in section 48-106, and who has any person in service under any contract of hire, express or implied, oral or written.[203]

Although this definition does not define the status of a pre-injury employer and a nonprofit organization in an MDOS program for purposes of workers' compensation, *Daniels v. Pamida, Inc.* revealed what such statuses would be in loaned-employee situations.[204]

### *1.* Daniels v. Pamida, Inc.

In *Daniels*, the plaintiff, Marty Daniels, was employed by A-Help, a labor broker that provided temporary labor services to employers.[205] A-Help assigned Daniels to work in Pamida's warehouse, where he subsequently suffered injuries.[206] Daniels filed a workers' compensation claim against A-Help and later settled the claim.[207] Then Daniels filed a negligence action against Pamida for the same injury redressed by the A-Help settlement and approved by the compensation court.[208] Pamida therefore asserted that Daniels' exclusive remedy was workers' compensation.[209]

The trial court agreed with Pamida, dismissing Daniels' action.[210] On appeal, the Nebraska Supreme Court affirmed, ruling that *both* A-Help and Pamida were "employers" within the meaning of the Workers' Compensation Act.[211] In so ruling, the court first adopted and explained[212] section 227 of the *Restatement (Second) of Agency*, which states: "A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and

202. *See* Daniels v. Pamida, Inc., 251 Neb. 921, 561 N.W.2d 568 (1997).
203. NEB. REV. STAT. § 48-114.
204. *Daniels*, 251 Neb. at 924, 561 N.W.2d at 570.
205. *Id.* at 922, 561 N.W.2d at 569.
206. *Id.*
207. *Id.*
208. *Id.* at 923, 561 N.W.2d at 569.
209. *Id.*
210. *Id.* at 923, 561 N.W.2d at 570.
211. *Id.* at 929, 561 N.W.2d at 572.
212. *Id.* at 927, 561 N.W.2d at 571–72.

not as to others."[213] The court applied this principle to the Workers' Compensation Act and found it "allows an employee to be simultaneously in the general employment of one employer and in the special employment of another."[214] The employee does not only remain an employee of the original employer but becomes the employee of the organization to whom he or she was loaned.[215]

The court then listed three conditions that must be satisfied before the receiving organization becomes an employer for purposes of workers' compensation: (1) the employee must have made a contract of hire, express or implied, with the receiving organization; (2) the work being done must be essentially that of the organization; and (3) the organization must have the right to control the details of the work.[216] When all three conditions are met, the receiving organization becomes liable for workers' compensation[217] but is also protected by the exclusivity of the Act.

The court found the three-part test was established with respect to Pamida.[218] Although A-Help paid Daniels' wages, withheld taxes and social security contributions, and directed Daniels to report to Pamida, Daniels could still refuse to report to any assignment and could voluntarily terminate any assignment.[219] Daniels voluntarily went to work with Pamida and performed the tasks assigned.[220] Thus Daniels made at least an implied contract of hire with Pamida.[221]

The *Daniels* court clearly recognized—in the context of workers' compensation—the effect of temporarily loaning an employee to another organization. The issue raised by the court was not whether A-Help was *permitted* to temporarily loan Daniels to another organization; the court only focused on whether the receiving organization would be liable for workers' compensation.[222] The court therefore presumed that the very practice itself was allowed.[223]

A company's disability management policy should be treated no differently than a temporary labor broker. Individuals join labor brokers with the understanding they will be temporarily assigned to another organization. Similarly, if a company seeking to implement an MDOS program makes its employees fully aware of its return-to-work

213. RESTATEMENT (SECOND) OF AGENCY § 227 (1958).
214. *Daniels*, 251 Neb. at 927, 561 N.W.2d at 572.
215. *Id.*
216. *Id.* at 928, 561 N.W.2d at 572.
217. *Id.*
218. *Id.* at 929, 561 N.W.2d at 572.
219. *Id.* at 928, 561 N.W.2d at 572.
220. *Id.*
221. *Id.*
222. *Id.* at 927, 561 N.W.2d at 572.
223. *See id.* ("[T]hat employee, with respect to that special service, may become the employee of the party to whom his services have been loaned.").

policy, then those employees will understand they are expected to work with a nonprofit organization in the event they are seriously injured. The potential problems would only arise if the employer failed to make employees aware of the MDOS program and if employees were subsequently selected to participate in the program in a way that was meant to harass the employee.[224]

*2. Additional Implications*

Finally, if the Nebraska compensation court looks to *Daniels* and the loaned-servant doctrine in the context of MDOS programs, companies must be aware of *Daniels's* additional implications. Namely, companies should protect the charity or nonprofit organization from being liable for workers' compensation.[225] Employers could prevent this by structuring the MDOS program agreement so at least one of the three conditions fails.[226]

The first condition of the loaned-servant doctrine can be overcome by making sure the employee does not create an express or implied employment contract with the special employer. In *Kaiser v. Millard Lumber, Inc.*,[227] the court ruled that in order to satisfy this condition, both the receiving organization and the employee must have the intent of entering into a contract of hire.[228]

In looking at the employee's intent, the court focused on the relevant facts of *Daniels*, which showed the employee could have refused the assignment by his employer, he voluntarily worked for the receiving organization, and he performed the tasks assigned to him by the receiving organization.[229] A company that requires[230] employees to participate in MDOS programs as part of an established return-to-work policy will be more likely to prove the employee did not have an intent to enter into an agreement with a charity or non-profit.

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224. *See* Kirk & Blum Mfg. Co. v. Hobbs, No. 2002-SC-1389-WC, 2003 WL 1218005, at *1 (Ky. Feb. 20, 2003) (discussing employee's light-duty assignment of "sitting at a conference table for eight hours a day, reading OSHA reports," which assignment the employee claimed was "depressing"). As discussed in *Gay*, however, an MDOS program that was clearly part of the company's policy was permitted, even though the plaintiff was the first employee to participate. Gay v. Teleflex Auto., No. 3:06-CV-7104, 2008 WL 896946, at *7 (N.D. Ohio Mar. 28, 2008).

225. But, by not being considered an "employer" for purposes of workers' compensation, the organization would then become liable for its torts. Fortunately, the risk of injury at a charity or nonprofit organization is very small. *See* Witham, *supra* note 6, at 1.

226. *See Daniels*, 251 Neb. at 928, 561 N.W.2d at 572 ("[T]hree conditions *must* be satisfied before the loaned-servant doctrine may be applied to a special employer to whom an employee has been sent by a general employer." (emphasis added)).

227. 255 Neb. 943, 587 N.W.2d 875 (1999).

228. *Id.* at 953, 587 N.W.2d at 882.

229. *Id.* at 952, 587 N.W.2d at 881.

230. Absent the employee's right to take FMLA leave. *See supra* subsection II.B.1.

The *Kaiser* court also discussed important factors that tend to show the receiving organization's intent to enter into a contract of hire.[231] When the organization's personnel are the employee's sole supervisors, and when those supervisors control every detail of the employee's work, a court will be more likely to find such intent.[232] Therefore, any MDOS program should ensure that the pre-injury employer retains a significant amount of supervision and control over the employee during the program.

The second condition of the loaned servant doctrine cannot be overcome in an MDOS program; the program is inherently meant to require injured employees to do the work of the receiving organization. The third condition, however, can be overcome by decreasing the organization's control over the employee and increasing the employer's control. This might be accomplished, for example, by requiring the employee to check in daily with the employer. The employee could receive work assignments from the organization that were routed from the organization to the employer. It would also be helpful if the agreement between the organization and the employer explicitly stated that the employer would handle all disciplinary and supervisory issues.

By overcoming one of the three above conditions, an employer can ensure that the nonprofit organization would not be liable for workers' compensation in the event the employee further injures himself or herself while working with the organization. These conditions can be averted primarily with a well-drafted agreement at the outset of the employer's relationship with the organization. The employer then must make employees aware of its ERTW policy.

## V. CONCLUSION

Workers' compensation laws are enacted primarily for the benefit of the employee. When an employer does not adequately compensate an employee for a work-related injury, the workers' compensation court enforces the employee's right to that compensation.[233] When an employer demotes an employee for filing a workers' compensation claim, the workers' compensation court protects the infringed interests of the employee.[234] But when the employer implements an ERTW program that provides myriad benefits to the employee, the employer, and the community—and is aligned with important public policy interests—the workers' compensation court must support the program.

231. *Id*. at 953, 587 N.W.2d at 883.
232. *See id.*
233. *See* Harmon v. Irby Constr. Co., 258 Neb. 420, 604 N.W.2d 813 (1999).
234. *See* Trosper v. Bag 'N Save, 273 Neb. 855, 865, 734 N.W.2d 704, 712 (2007).

MDOS programs do just that. With the proper boundaries in place, injured employees have very little chance of being harmed—the upside to MDOS programs clearly outweighs any risks. It is therefore incumbent upon the Nebraska legislature to unequivocally permit MDOS programs in this state. Until such action is taken, however, the Nebraska Workers' Compensation Court should acknowledge that the program is viable in light of Nebraska statutory and case law. By so doing, the court would be helping injured employees return to the workplace, thereby furthering the main purpose of the Workers' Compensation Act.[235]

235. NEB. REV. STAT. § 48-162.01(1) (Reissue 2010).